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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket Number: FTA-2016-0013]

Notice of Proposed Equal Employment Opportunity Program Circular

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of proposed revisions to circular and request for comment.

SUMMARY: The Federal Transit Administration (FTA) has placed in the docket and on its website proposed guidance in the form of a Circular to assist grantees in complying with various Equal Employment Opportunity regulations and statutes. The purpose of this Circular is to provide recipients of FTA financial assistance with instructions and guidance necessary to carry out the U.S. Department of Transportation's Equal Employment Opportunity regulations (*****). FTA is updating its "Equal Employment Opportunity (EEO) Program Guidelines for Grant Recipients" to clarify the requirements for compliance. By this notice, FTA invites public comment on the proposed circular.

DATES: Comments must be submitted by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Please submit your comments by only one of the following methods, identifying your submission by docket No. FTA-2016-0013. All electronic submissions must be made to the U.S. Government electronic site at <http://www.regulations.gov>.

- (1) *Federal eRulemaking Portal*: Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- (2) *Mail*: Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue S.E., West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- (3) *Hand Delivery or Courier*: West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue S.E., between 9 a.m. and 5 p.m. Eastern time, Monday through Friday, except Federal holidays.
- (4) *Fax*: (202) 493–2251.

Instructions: You must include the agency name (Federal Transit Administration) and Docket number (FTA-2016-0013) for this notice at the beginning of your comments. Submit two copies of your comments if you submit them by mail. If you wish to receive confirmation that FTA received your comments, you must include a self-addressed stamped postcard. Note that all comments received will be posted without change to <http://www.regulations.gov> including any personal information provided and will be available to Internet users. You may review DOT’s complete Privacy Act Statement published in the **Federal Register** on April 11, 2000 (65 FR 19477) or <http://DocketsInfo.dot.gov>.

Docket: For access to the docket to read background documents and comments received, go to <http://www.regulations.gov> at any time or to the U.S. Department of Transportation, 1200 New Jersey Avenue S.E., Docket Operations, M–30, West Building Ground Floor,

Room W12–140, Washington, DC 20590 between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Anita Heard, Office of Civil Rights, Federal Transit Administration, 1200 New Jersey Avenue SE, Room E54–420, Washington, DC 20590, phone: (202) 493-0318, or email, *anita.heard@dot.gov*. For legal questions, Gwendolyn Franks, Office of Chief Counsel, 915 2nd Avenue, Suite 3142, Seattle, WA 98174, phone: 206-220-7954, or email: *gwendolyn.franks@dot.gov*.

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I. Overview

FTA is updating its EEO Circular to clarify what recipients must do to comply with Titles VI and VII of the Civil Rights Act of 1964, Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), 49 U.S.C. Chapter 53 (the Federal Transit law), other Federal civil rights statutes, and the U.S. Department of Transportation (DOT) regulations in 49 CFR part 21 . The EEO Circular, last revised in 1988 when the Federal

Transit Administration (FTA) was called the Urban Mass Transportation Administration (UMTA), requires changes to bring EEO-related guidance up to date. This notice provides a summary of proposed changes to Circular 4704.1, “Equal Employment Opportunity Program Guidelines for Grant Recipients.” The final Circular, when adopted, will supersede the existing circular.

The proposed Circular incorporates the Department of Labor’s standards for an affirmative action program; the Equal Employment Opportunity Commission (EEOC) regulations; the guidelines for an effective implementation of Executive Order 11246, as amended; section 503 of the Rehabilitation Act of 1973, as amended; Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), and the Americans with Disabilities Act of 1990; and other civil rights statutes related to employment practices. These laws ban discrimination and require Federal contractors and subcontractors to take affirmative action to ensure that all individuals have an equal opportunity for employment, without regard to race, color, religion, sex, age, national origin, disability, veteran status, or genetic information. Additionally, since the existing Circular went into effect, legislation and court cases have transformed affirmative action policies and affected recipients’ and beneficiaries’ responsibilities. The proposed Circular would incorporate these changes in law and judicial interpretations. Also, the proposed Circular would incorporate lessons learned from FTA administered oversight activities, including triennial and state management reviews, and discretionary EEO compliance reviews. During these reviews, FTA identified problems related to ambiguous language in the existing Circular. These problems included failure to conduct utilization analyses, failure to develop effective and measurable goals and timetables, and failure to execute a written

plan for internal and external dissemination of its EEO Policy. The proposed circular reorganizes, clarifies, and provides examples of the information that must be included in a compliant EEO program. This document does not include the proposed circular on which FTA seeks comment; however, an electronic version may be found on FTA's Web site at <http://www.fta.dot.gov>, and in the docket, at <http://www.regulations.gov>. Paper copies of the proposed Circular may be obtained by contacting FTA's Administrative Services Help Desk, at (202) 366-4865.

II. Chapter-by-Chapter Analysis

Readers familiar with the existing FTA Circular 4704.1 will notice a number of changes to the proposed circular.

The proposed circular eliminates outdated nomenclature, such as references to "UMTA," references to the "Urban Mass Transit Act," and removes references to statutory provisions such as the "Federal Aid Urban System Program." The title of the proposed circular has been change to "Equal Employment Opportunity (EEO) Requirements and Guidelines for Federal Transit Administration Recipients."

We have also reorganized the proposed circular for ease-of-read. The existing Circular is organized as follows:

Chapter I- General;

Chapter II- Coverage;

Chapter III- EEO Program Components;

Chapter IV- Types of Compliance Reviews;

Chapter V- Remedial Actions and Enforcement Procedures; and

Chapter VI- Discrimination Complaints.

The proposed circular is organized as follows:

Chapter 1 - Introduction and Applicability;

Chapter 2 - EEO Program Requirements; and

Chapter 3 - EEO Compliance Oversight, Complaints, and Enforcement

Proposed Chapter 1 includes existing Chapters 1 and 2, excluding the “Frequency of Update” subsection from existing Chapter II. Proposed Chapter 2 includes the “Frequency of Update” subsection and existing Circular Chapter III. The Proposed Chapter 3 includes Chapters IV, V, and VI from the existing Circular.

FTA seeks comments on the scope and content of the proposed Circular, specifically as to whether there are areas that need more clarification or explanation, or topics that were overlooked. FTA also seeks suggestions for resources that should be included in the proposed Circular, including good practices and sample materials. Additional items FTA seeks comment on are included in the chapter-by-chapter analysis below.

A. Chapter 1—Introduction and Applicability

Chapter 1 of the proposed circular is an introductory chapter that reviews the organization of the circular, the authority for establishing the circular, and applicability to grantees.

The proposed circular chapter includes added sections entitled Introduction, Organization of this Circular, and Authorities. The content of the Introduction and Authorities sections contain updated information currently covered in Chapter I of the existing circular. The authority for the EEO program requirements includes statutes, regulations, and executive orders that establish the context for ensuring nondiscrimination in employment on the basis of a protected class. The proposed Organization of this Circular section is new and intended to assist the reader's understanding of the proposed circular structure. The proposed State Administered Programs section contains updated references and includes the most recent information about the MOU between FTA and FHWA on this subject. The proposed Definitions section is significantly updated.

Where the current circular definitions reference UMTA, the proposed definitions reference FTA. We have proposed new definitions where current law has created new terminology or where terms are unclear or undefined in the existing circular. Some definitions have been updated to comply with existing law or to increase clarity. Where applicable, we have used the same definitions found in rulemakings or other circulars to ensure consistency.

Proposed new definitions include: Adverse impact, Complainant, Disability, Disparate impact Disparate treatment, Employee, Equal Employment Opportunity Program (EEOP), Equal Employment Opportunity statutes and regulations, Federal financial assistance, FTA activity, One-person rule, Programs or activities, Protected class, and Transit-related employee. Proposed updated definitions include: Applicant, Compliance, Contractor, Discrimination, Good faith efforts, Minority persons,

Noncompliance, Primary recipient, Recipient or Grantee, and Secretary. Two definitions have been removed in the proposed circular: Affirmative Action Plan and Probable Noncompliance.

FTA seeks comment on potential changes to the Memorandum of Understanding (MOU) between FTA and the Federal Highway Administration (FHWA). Currently, FTA has the responsibility for reviewing, monitoring, and approving state DOT's EEO Programs in accordance with FTA's regulations, policies, and guidance, while FHWA has the responsibility for reviewing, monitoring and approving state DOT's EEO Programs in accordance with FHWA's regulations, policies, and guidance. Although FHWA currently requires an annual to multiyear program submission, FTA requires EEOP submissions on a triennial basis. FTA seeks comments on developing an updated MOU between FTA and FHWA, which would allow state DOTs to submit a single EEO program that will satisfy both FTA and FHWA requirements.

FTA also seeks comment regarding a potential change to the threshold for Equal Employment Opportunity Program submission from the current standard of grantees with 50 transit-related employees, to grantees with 100 transit-related employees.

FTA seeks comment on establishing a Memorandum of Understanding between FTA and the Department of Labor (DOL) with regard to EEO program submissions and approval. The MOU would allow the agency to submit an EEO Program that would satisfy both FTA and DOL submission requirements.

FTA seeks comment on the content of Chapter 1.

B. Chapter 2—EEO Program Requirements

Chapter 2 of the proposed Circular discusses how frequently a grantee must submit an updated Equal Employment Opportunity Program (EEOP). The proposed Frequency of Update section is moved from the current Chapter II – Coverage and combined with the components of the current Chapter III – EEO Program Requirements. The Frequency of Update section proposes to remove the discretion of the FTA Office of Civil Rights to request less information from a recipient when the previous EEO program has not changed significantly in the intervening three years.

Proposed Chapter 2 primarily explains the seven required elements of an EEOP for FTA review. The chapter details proposed required language, required supporting documentation, the type of analysis that must be conducted, and the acceptable methods to report the results of the analysis. The seven elements proposed are:

- (1) Statement of Policy
- (2) Dissemination
- (3) Designation of Personnel Responsibility
- (4) Utilization Analysis
- (5) Goals and Timetables
- (6) Assessment of Employment Practices
- (7) Monitoring and Reporting

A majority of proposed Chapter 2 has been relocated from Chapters II and III of the existing circular. However, those familiar with the EEOP will notice a few changes in these sections.

Proposed subsection 2.2.2, “Dissemination,” increases the frequency requirement for meeting with top management officials to discuss the EEOP from a minimum of “semiannually” to a minimum of “quarterly.” This section also proposes simplification of and updated language for External Dissemination requirements.

Impartiality is important to the EEOP’s credibility. Specifically, the separation of functions would entail separating the EEO Officer position from human resources positions and other positions that serve defensive functions in an agency, such as the legal office. With regards to “Designation of Personnel Responsibility” in proposed subsection 2.2.3, FTA proposes to add a requirement that agencies must “ensure that no conflicts of position or conflicts of interest occur or appear to occur with respect to the EEO Officer’s role.” The proposed Circular would require “the functional unit that reviews EEO matters be separate and apart from the unit that represents the agency in EEO complaints.” This proposed section also adds requirements for the EEO Officer’s EEOP Responsibilities, including reviewing the agency’s nondiscrimination plan with all managers and supervisors, periodic reviews of policies, procedures, and union agreements, providing training for employees and managers, advising employees and applicants of training and development opportunities, and auditing of EEO Policy statement postings to ensure compliance. The section also proposes to alter existing responsibilities, including a requirement for reporting “quarterly” instead of “periodically” on each department’s progress toward goals, and “investigating” complaints of discrimination instead of “processing” such complaints. FTA proposes to remove the requirement that the EEO Officer concur in all hires and promotions.

In the area of Agency EEO Responsibilities, the proposed circular updates and streamlines some of the enumerated requirements in the existing circular and adds two responsibilities. FTA proposes requirements to add and update a personnel database, and to encourage employee participation to support the advancement of the EEOP. The proposed section removes explicit requirements for assisting in the identification of problem areas, active involvement in affinity groups and community organizations, career counseling of employees, and participation in periodic audits to ensure each agency unit is compliance. FTA believes the concepts in the removed items are captured elsewhere in Chapter 2.

Proposed subsection 2.2.4, “Utilization Analysis,” requires agencies to use EEO-4 reporting categories. This proposal changes the approach to Utilization Analysis in the current circular. Additionally, this section discusses a new MOU between EEOC and FTA which allows FTA to obtain the agency’s EEO-4 utilization numbers. As a result, the transit agency or grantee will be able to access their current utilization numbers and complete the required utilization in FTA’s electronic database under the proposed language. For agencies under 100 employees that do not submit reports to EEOC, this proposed section also includes links to a Microsoft Excel spreadsheet template (with instructions) for use in completing the utilization and availability analysis. The proposed language adds requirements for Availability Analysis, including explanation of and requirements for explaining why agencies selected particular areas for the analysis and quantifying plans when underutilization is identified.

Proposed subsection 2.2.5, “Goals and Timetables,” proposes to require agencies to set long term and short term numerical goals and timetables for each individual

minority group, broken down by specific racial/ethnic subcategories for men and women. This section includes changes to the guidelines for goal setting, including a guideline to set goals that are realistic and measurable. The proposed requirements reduce the long term goal period from 4-5 years to 2 or more years. FTA also proposes to add a requirement that agencies collect reports from unit managers on a scheduled basis to determine what goals are being met and to review these reports with all levels of management.

Proposed subsection 2.2.6, “Assessment of Employment Practices,” removes reference to “Affirmative Action” in the heading. It also proposes to move discussion of self-analysis from the Goals and Timetables section of the current circular to proposed subsection 2.2.6. We propose to add a requirement that statistical data show any potential impact of an agency’s employment practices on persons with disabilities and veterans. This includes the number of applicants for employment, the number hired, and the number promoted, cross-references by sex and race. Having this data will assist in measuring the effectiveness of outreach and recruitment efforts for persons with disabilities and veterans. The proposed section also adds requirements for a description of the agency’s training programs, review of wage and salary structure, establishment of privacy protocols, and collection of reports from unit managers on a scheduled basis in a manner similar to Goals and Timetables requirements.

Proposed subsection 2.2.7, “Monitoring and Reporting,” updates the description of the purposes of the monitoring and reporting system. The proposed section adds a requirement for agencies to describe the complaint process and maintain a log of complains. The proposed section also requires agencies to maintain records on applicants,

hires, transfers, promotions, training and termination. Finally, the proposed section adds a list of Required EEOP Attachments.

FTA seeks comment on the content of Chapter 2. With regards to the EEOP process, FTA seeks comment on the paperwork burdens for carrying out the requirements set forth in the proposed circular. Specifically FTA seeks comment on how long it will take to develop an EEO Program with the requirements set out in Chapter 2 of the proposed Circular. FTA also seeks suggestions from grantees regarding how to use information technology to decrease the amount of time it takes to develop an EEO Program.

C. Chapter 3—EEO Compliance Oversight, Complaints, and Enforcement

Chapter 3 of the proposed circular combines topics covered in chapters IV, V, and VI of the existing circular. It explains how FTA carries out its EEO oversight and enforcement responsibilities. This includes a discussion of factors that lead to FTA conducting a compliance review such as lawsuits, complaints, or investigations conducted by organizations other than FTA, insufficient EEO program submissions, EEO findings, or recommendations from prior triennial, state management reviews that are deficient. The chapter explains the EEO compliance review process and the required steps for implementing corrective actions for any deficiencies found during the review. The chapter also covers the complaint process and how grantees can file a complaint.

Proposed section 3.1, “Compliance Oversight,” updates the description of types of oversight reviews and authorities for such reviews. FTA proposes to change the description of compliance reviews to encompass all reviews and remove the distinction between “Application Reviews” and “Post-Approval Reviews” in the existing circular.

Further, FTA proposes to change the frequency requirement for compliance reviews outside of the Triennial Review or State Management Review cycle. The current circular requires these reviews “at least once every 3 years.” FTA proposes to change the frequency to allow FTA to determine the frequency and scope of the reviews at its discretion and on a case-by-case basis.

Proposed section 3.1.3 removes the explanation of Remedial Action Plans.

Proposed section 3.2, “Complaints,” is reorganized and proposes to add significantly more detail to the complaint process. In proposed subsection 3.2.6, FTA proposes to add an Administrative Closure option.

FTA seeks comment on the content of Chapter 3.

D. Appendix A – References

Proposed Appendix A adds a list of references to the proposed circular. A similar list is contained on the cover page of the existing circular. The proposed list of references in Appendix A updates and adds references based on the current state of the law and guidance.

FTA seeks comment on the content of Appendix A.

Issued in Washington, D.C.

Therese W. McMillan

Acting Administrator

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